Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2016

In the Supreme Court of the United States

October Term, 1980

JAMES P. FRACKELTON,
Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondents contend that petitioner improperly invokes the jurisdiction of this Court by having failed to sufficiently and properly raise the federal question in the state courts. Petitioner submits this reply brief in support of his petition and in response to Respondents' allegations.

THE CONSTITUTIONAL CLAIMS PRESENTED WERE SUFFICIENTLY RAISED IN THE STATE COURTS, AND DECIDED THERE.

Review of the briefs filed by petitioner in both the trial court and the Ohio Court of Appeals reveals that petitioner asserted that the practice of medicine is a protected property right under the Constitutions of the United States and Ohio; and that interference with this property right constitutes an unconstitutional deprivation of property. (Page 11, Brief in Opposition to Motions to Dismiss; and pages 19 and 20, Assignments of Error and Brief filed in the Court of Appeals of Ohio, Eighth Appellate District, copies of which briefs have been lodged with the Clerk of the Supreme Court by respondents). Respondents concede that the constitutional issues were clearly raised in the memorandum in support of jurisdiction filed by petitioner in the Supreme Court of Ohio.

While respondents may question the precision with which the constitutional issues were raised, it cannot be denied that such issues were raised. This Court has stated that in order to preserve a constitutional issue for review, a party need not state the issue *in totidem verbis*, so long as the issue is raised by a necessary inference from the facts. *Crowell v. Randell*, 35 U.S. 365 (1836). Nor need the specific federal right or constitutional provision be set out in order to give this Court jurisdiction to review a state court decision. If the record demonstrates that a federal question has been brought to the attention of a state court either expressly or by clear intendment, jurisdiction is preserved. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1978). See also, *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954).

Furthermore, even if there was some colorable lack of precision in framing the constitutional question before the courts below, the question was clearly placed before the Ohio Supreme Court, and that Court ruled on the issue. Reference to the Ohio Supreme Court's order dismissing the appeal (Appendix A-2, to the petition for writ of certiorari), reveals that the Supreme Court of Ohio *sua sponte* dismissed petitioner's appeal "for the reason that no substantial constitutional question exists herein". In order to reach such a conclusion, the Ohio Supreme Court must necessarily have considered the constitutional issue. The only constitutional issue which was presented before the Ohio Supreme Court is the precise constitutional issue presented here, *i.e.* that dismissal of the malicious prosecution action violated petitioner's due process and equal protection rights guaranteed by the United States Constitution. The Ohio Supreme Court could have considered and dismissed no other constitutional question, for no other constitutional question was raised. It is well established that even in face of a deficiency in the particularity with which a federal issue was framed below, that deficiency is cured if the highest state court assumed that the federal question was properly before it and expressly considered and decided same. Thereafter, this Court will not inquire into the framing of the issue below. *Saltonstall v. Saltonstall*, 276 U.S. 260 (1928); *Charleston Federal Savings v. Alderson*, 324 U.S. 182 (1945). Moreover, a state court's refusal or failure to articulate its denial of a federal claim is just as reviewable as an express decision. The question of whether the issue was raised properly is itself a federal question, as to which this Court is not bound by the state court decision. *Street v. New York*, 394 U.S. 576 (1969). After a state supreme court has decided a constitutional issue, any inquiry as to how or when the issue was raised is considered

irrelevant by this Court, and an irrebuttable presumption exists that the issue was properly raised below. *Charleston Federal Savings v. Alderson, supra.* This is true even if the issue was raised in the assignments of error only. The lower court is still deemed to have considered the question. *Konigsberg v. State Bar of California,* 353 U.S. 252 (1956).

Finally, even in the absence of a showing that a constitutional issue was raised at the earliest possible time, this Court has never precluded itself from considering such constitutional issues. This Court has exercised review with respect to plain errors of constitutional proportions not raised below. *Vachon v. New Hampshire,* 414 U.S. 478 (1974), *reh. den.,* 415 U.S. 952; *Thompson v. City of Louisville,* 362 U.S. 199 (1960). If various rights, privileges and immunities are claimed, certiorari has been granted to determine issues of great public importance. *Raley v. Ohio,* 360 U.S. 423 (1959).

CONCLUSION

For the reasons advanced in the petition for writ of certiorari, and in this reply brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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